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No. 98-5021

ORIGINAL

Supreme Court, U.S.

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RESPONSE REQUESTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MICHAEL W. RIGGS,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

98-5021
Riggs
v.
California

1. Whether this Court should consider Petitioner's claims based on due process and the prohibition against ex post facto laws when these claims were not properly raised or addressed in the California courts.

2. Whether Petitioner's sentence of 25 years to life under California's "Three Strikes Law" for a conviction for petty theft with a prior violates the prohibition against cruel and unusual punishment where Petitioner suffered prior convictions for vehicle theft, two counts of possession of a controlled substance, two counts of forgery, two counts of receiving stolen property, attempted burglary, passing a check with intent to defraud, and four counts of robbery.

LIST OF PARTIES

Petitioner, Michael W. Riggs, is a state prisoner, convicted of petty theft with a prior felony conviction and sentenced to 25 years to life in state prison under California's "Three Strikes Law."

The State of California¹ is the respondent and was the plaintiff in the underlying action.

1. Petitioner has named the warden of Corcoran State Prison, J.W. Fairman, and the Attorney General as respondents. However, the State of California is the proper party on direct appeal.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998
No. 98-5021

MICHAEL W. RIGGS, Petitioner,
Petitioner,
v.
THE STATE OF CALIFORNIA,
Respondent.

OPINIONS BELOW

On December 17, 1997, the California Court of Appeal, Fourth Appellate District, Division Two, in People v. Riggs, No. E019488, filed an unpublished opinion affirming Petitioner's convictions for petty theft with a prior and possession of a hypodermic syringe and upholding his sentence of 25 years to life under California's "Three Strikes Law." App., B-2-15.

On February 25, 1998, the California Supreme Court entered an unpublished order denying Petitioner's Petition for Review of the Court of Appeal's opinion. (S067322) App., A-1.

STATEMENT OF JURISDICTION

Jurisdiction is invoked pursuant to Title 28 United States Code section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

The Fourteenth Amendment to the Constitution provides in pertinent part:

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

Article I, Section 10, of the Constitution provides in pertinent part:

"No State shall . . . pass any . . . ex post facto Law,"

The Eighth Amendment provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The California "Three Strikes Law" is set forth in California Penal Code sections 667 et seq. and 1170.12. App., C-16-33.

SUMMARY OF ARGUMENT

The Attorney General urges that the Petition for Writ of Certiorari be denied. First, Petitioner failed to properly present his due process and ex post facto claims in the California Court of Appeal and therefore certiorari should be denied as to these claims. Second, this Court's previous decisions dispose of the claim that Petitioner's sentence amounts to cruel and unusual punishment.

STATEMENT OF THE CASE

Petitioner was convicted of stealing a bottle of vitamins from an Albertson's Supermarket in Banning, California, and possessing a hypodermic syringe which was discovered upon his arrest. Appellant was sentenced to 25 years to life under California's "Three Strikes Law." Appellant had prior convictions for vehicle theft, two counts of possession of a controlled substance, two counts of forgery, attempted burglary, two counts of receiving stolen property, passing a check with intent to defraud, and four counts of robbery. App., F-110-111. The four robbery convictions were "Strikes" under the relevant statutes. California Penal Code §§ 667(c)(e), 667.5(c), 1170.12(c). App., C-16-33. On December 17, 1997, the Court of Appeal affirmed his conviction and sentence in an unpublished decision. App., B-2-15. On February 25, 1998, the California Supreme denied Petitioner's Petition for Review. App., A1. Petitioner seeks certiorari from the California Supreme Court's denial of his Petition for Review.

ARGUMENT

I.

PETITIONER'S DUE PROCESS AND EX POST FACTO CLAIMS WERE NOT PROPERLY RAISED OR ADDRESSED IN STATE COURT AND SHOULD NOT BE CONSIDERED BY THIS COURT

Petitioner did not claim in the Court of Appeal that the "Three Strikes Law" violated his due process rights or that the "Three Strikes Law" constituted an ex post facto law. App., G-120-150. Nor did the Court of Appeal address these issues in its opinion. App., B-2-15. In the Petition for Review filed by counsel for Petitioner, the sole issue raised was that Petitioner's sentence amounted to cruel and unusual punishment. App., D-34-48. In a separate Petition for Review filed pro per the due process and ex post facto issues were raised. App., E-65-83. However, raising an issue for the first time in a petition for review which is summarily denied does not express a view on the merits and therefore the issue has not been properly raised or addressed by the state courts.

In reviewing state court judgments under the jurisdictional grant of 28 U.S.C. 1257, this Court has, with very rare exceptions, refused to consider a petitioner's claims that were not raised or addressed below. Illinois v. Gates, 462 U.S. 213, 218-220, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Where the highest state court has failed to pass upon a federal question, it is presumed the omission was from want of proper presentation in the state courts, unless the petitioner can affirmatively show to the contrary. Street v.

New York, 394 U.S. 576, 582, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1968). Here, Petitioner cannot carry this burden because he did not properly raise the due process and ex post facto claims in state court.

Yee, et al. v. City of Escondido, California, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1991), is directly on point. In Yee, the petitioners raised a due process claim with this Court that they had not raised with the California Court of Appeal but had later included in their petition for review with the California Supreme Court. The California Supreme Court denied discretionary review. Id. at p. 533. This Court ruled such a denial "expresses no view as to the merits" and thus the petitioners had not raised the "claim in the state courts, and no state court has addressed such a claim." Id. Here, Petitioner did not raise these two claims until he filed his Petition for Review with the California Supreme Court. The California Supreme Court denied discretionary review. Comity mandates that the petition for certiorari as to these issues should be denied.

II.

PETITIONER'S SENTENCE OF 25 YEARS TO LIFE DOES NOT VIOLATE THE EIGHTH AMENDMENT IN LIGHT OF SUPREME COURT PRECEDENT

The California Court of Appeal resolved the issue of whether Petitioner's sentence was cruel and unusual based on principles of law already settled by this Court. Petitioner's sentence was clearly constitutional under relevant precedent and therefore a grant of certiorari is not required. See Rule 10, Rules of the Supreme Court of the United States.

This Court has decided that recidivist statutes such as California's are not facially unconstitutional. Spencer v. Texas, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed.2d 606 (1967). Petitioner does not contend that the statute on its face violates the prohibition against cruel and unusual punishment but attacks the result of applying California's "Three Strikes Law" to the facts of his case. Pet. at 19-25. In light of this Court's precedent, the question has already been decided.

This Court addressed the issue of cruel and unusual punishment for sentences imposed pursuant to recidivist statutes in Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). In Rummel, the petitioner was sentenced to life under Texas's "recidivist statute." The petitioner claimed the sentence was grossly disproportionate to the three felonies that formed the predicate to his sentence. Id. at 265. His three felonies were credit card fraud amounting to \$80.00, forgery of a \$28.36 check, and

obtaining \$120.75 by false pretenses. Id. at 265-266. Rummel could be paroled after 12 years. Id. at 268, 278 n. 17.

This Court first noted that outside the context of capital punishment, "successful challenges to the proportionality of particular sentences have been exceedingly rare." Id. at 272. It is the province of the legislatures and not the courts to set sentences for convicted felons. Id. at 276. In upholding the petitioner's sentence in Rummel, this Court found it significant that Rummel had to twice demonstrate that conviction and actual imprisonment did not deter him. Id. at 278. The Texas legislature's ability to draw the line on what constitutes petty theft and what constitutes a serious felony was upheld. This Court stated:

"Moreover, given Rummel's record, Texas was not required to treat him in the same manner as it might treat him were this his first 'petty property offense.' Having twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State."

Id. at 284.

It is for the legislature to decide when a recidivist should be segregated from the rest of society for an extended period of time. Id. at 284-285.

Three years later, this Court overturned a sentence imposed under a recidivist statute based on the Eighth Amendment in Solem v. Helm, 463 U.S. 267, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). In Solem, the defendant received a life sentence without the possibility of parole. He had committed six nonviolent felonies prior to his current conviction for

uttering a "no account" check. Id. at 279-281. This Court first found there was a principle of proportionality in the Eighth Amendment. Id. at 286-290. Objective factors were set forth to evaluate the sentence: the gravity of the offense and the harshness of the penalty, sentences imposed on other criminals in the same jurisdiction, and sentences for the same offense in different jurisdictions. Id. at 290-292.

Applying these factors, this Court found the sentence of life without the possibility of parole was cruel and unusual punishment because the crimes the petitioner had committed were all nonviolent and none was a crime against a person. This Court also found, based on the other two factors, that the punishment was disproportionate. Id. at 296-303. This Court distinguished Rummel, because the sentence in Solem was far more severe than that in Rummel because Rummel was likely to be eligible for parole within 12 years. Id. at 297.

Subsequently, in Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), this Court upheld a life sentence without the possibility of parole for a defendant who had possessed 672 grams of cocaine. While Harmelin did not contain a majority opinion with respect to the proportionality of the sentence, two justices determined that the Eighth Amendment had no proportionality guarantee and suggested that Solem be overruled. Harmelin, 501 U.S. at p. 965 (opn. of Scalia, J.) Three other justices concluded that the Eighth Amendment forbade only those sentences that were

"grossly disproportionate" to the crime. Harmelin, 501 U.S. at p. 1001 (opn. of Kennedy, J.) Even those justices who recognized a guarantee of proportionality review stressed that, outside the context of capital punishment, successful challenges to particular sentences were exceedingly rare because of the "relative lack of objective standards concerning terms of imprisonment." Id. The fact that a sentence is mandatory does not suggest that it is cruel and unusual. Harmelin v. Michigan, supra, 501 U.S. at pp. 994-995.

Here, Petitioner had been convicted of vehicle theft, two counts of possession of a controlled substance, two counts of forgery, attempted burglary, two counts of receiving stolen property, as well as four separate counts of robbery which were "Strikes" under California's recidivist statute, prior to his current conviction of petty theft with a prior. He was sentenced to 25 years to life pursuant to California Penal Code sections 667(c)(e), 667.5(c), and 1170.12(c) and will be eligible for parole after 25 years. Cal. Penal Code § 3046; People v. Stofle, 45 Cal. App. 4th 417, 420-421, 52 Cal. Rptr. 1829 (1996).

This case is governed by Rummel. The California Court of Appeal properly upheld Petitioner's sentence of 25 years to life. Petitioner was not sentenced to life without possibility of parole and has committed four violent felonies (robbery) as well as having a long history of criminal behavior and therefore Solem does not apply. This Court's recent declaration that rarely will a state legislature be second

guessed in imposing a term of years also supports the Court of Appeal's determination.² In light of his criminal past, Petitioner's sentence cannot be considered cruel and unusual under this Court's precedent. As such, there is no reason to grant Petitioner's Petition for Certiorari.

2. In upholding Petitioner's sentence, the Court of Appeal applied the factors set forth in Solem and noted that at least 40 states have recidivist statutes and that California's does not appear to be more burdensome than others. App., B-11, n. 2.

CONCLUSION

For the foregoing reasons, Respondent submits the Petition for Writ of Certiorari should be denied.

Dated: October 29, 1998.

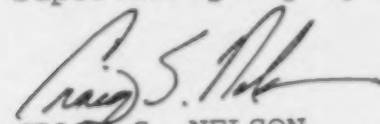
Respectfully submitted,

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Cite as: ___ U. S. ___ (1999)

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Memorandum of STEVENS, J.

SUPREME COURT OF THE UNITED STATES

MICHAEL WAYNE RIGGS v. CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT
OF APPEAL OF CALIFORNIA, FOURTH
APPELLATE DISTRICT

No. 98-5021. Decided January 19, 1999

The petition for a writ of certiorari is denied.

Opinion of JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, respecting the denial of the petition for a writ of certiorari.

This *pro se* petition for certiorari raises a serious question concerning the application of California's "three strikes" law, Cal. Penal Code Ann. §667 (West Supp. 1998), to petty offenses.

In 1995, petitioner stole a bottle of vitamins from a supermarket. The California Court of Appeal described his offense as "a petty theft motivated by homelessness and hunger." App. to Pet. for Cert. at 12. If this had been petitioner's first offense, it would have been treated as a misdemeanor punishable by a fine or a jail sentence of six months or less. See Cal. Penal Code Ann. §490 (West 1988). Because of petitioner's prior record, however, the trial judge was authorized, and perhaps even required, to treat the crime as a felony. See Cal. Penal Code Ann. §666 (West Supp. 1998); *People v. Terry*, 47 Cal. App. 4th 329, 54 Cal. Rptr. 2d 769 (1996); *People v. Dent*, 38 Cal. App. 4th 1726, 45 Cal. Rptr. 2d 746 (1995). Having elevated the character of the offense, the judge was then compelled to apply the mandatory sentencing provisions of the three-strikes law and to impose a minimum sentence of 25 years to life imprisonment. See Cal. Penal Code Ann. §667(e)(2)(A) (West Supp. 1998) (requiring that persons convicted of a "felony" who have two prior qualifying felony convictions be so sentenced). Petitioner asks us to

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BREYER, J., dissenting

tional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.' " *Witte v. United States*, 515 U. S. 389, 400 (1995) (quoting *Gryger v. Burke*, 334 U. S. 728, 732 (1948)). See also *Moore v. Missouri*, 159 U. S. 673, 677 (1895) (under a recidivist statute, "the accused is not again punished for the first offence" because "the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself"). It is thus unclear how, if at all, a defendant's criminal record beyond the requisite two prior "strikes"—petitioner in this case has eight prior felony convictions—affects the constitutionality of his sentence, especially when the State "double counts" the defendant's recidivism in the course of imposing that punishment. Cf. *Solem*, 463 U. S., at 298–299; *Rummel*, 445 U. S., at 274, n. 11.

The denial of this petition for certiorari, as always, does not constitute a ruling on the merits. Moreover, since petitioner is asking us to apply a settled rule of Eighth Amendment law, rather than to fashion a new rule, his claim may be asserted in federal court by way of an application for a writ of habeas corpus. See *Spencer v. Georgia*, 500 U. S. 960, 960 (1991) (KENNEDY, J., concurring in the denial of certiorari). It is therefore prudent for this Court to await review by other courts before addressing the issue. Cf. *McCray v. New York*, 461 U. S. 961 (1983) (opinion of STEVENS, J., respecting denial of certiorari).

JUSTICE BREYER, dissenting from the denial of the petition for a writ of certiorari.

I agree with JUSTICE STEVENS that this petition for certiorari raises a serious question concerning the application of a "three-strikes" law to what is in essence a petty offense. I believe it appropriate to review that question in this case and would grant the writ of certiorari.

Supreme Court of the United States

No. 98-5021

Michael Wayne Riggs,
Petitioner

v.

California

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of California, Fourth Appellate District, No. E019488.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Court of Appeal of California, Fourth Appellate District.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

January 19, 1999

Opinion of Justice Stevens, respecting the denial of the petition for a writ of certiorari, with whom Justice Souter and Justice Ginsburg join.

A true copy WILLIAM K. SUTER
Test:

Clerk of the Supreme Court of the United States

By _____

Deputy